UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
GREENVILLE DIVISION

Life Funding Options, Inc. Plaintiff, v. Latonya Blunt, Defendant, _____ Latonya Blunt, Third Party Plaintiff, v. BAIC, Inc., VFG, Inc., (f/k/a Voyager Financial Group), SoBell Ridge Corp., Performance Arbitrage Company, Life Funding Options, Inc., Andrew Gamber, Mark Corbett, Katherine Snyder, Michelle Plant, Candy Kern-Fuller, and Upstate Law Group, Defendants. _____	C.A. No. 6:18-CV-00944-DCC **MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT BY UPSTATE LAW GROUP, LLC AND CANDY KERN-FULLER**

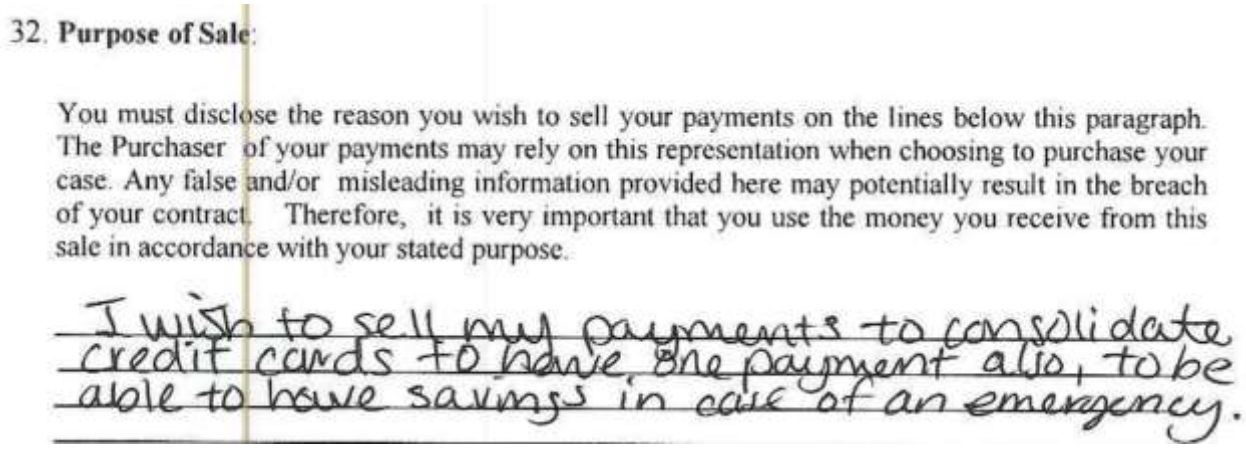
This Memorandum of Law is in support of Defendants Upstate Law Group's ("Upstate") and Candy Kern-Fuller's ("Kern-Fuller") (collectively "Upstate Defendants") Motion for Summary Judgment on Third-Party Plaintiff's Claims (hereinafter referred to as "Blunt's Complaint" or "TP Complaint") pursuant to Rule 56 of the FEDERAL RULES OF CIVIL PROCEDURE on the basis that there are no material facts in controversy and Third-Defendants are entitled to Summary Judgment as a matter of law on all of Blunt's claims in her TP Complaint.

I. UNDISPUTED FACTS

A. Background

This RICO lawsuit arises out of a transaction that Latonya Blunt (Hereinafter referred to as "Blunt") willingly sought out and then voluntarily entered into to sell a portion of her fixed income stream to a private buyer for a lump-sum payment. (**ECF 19-5 and ECF 19-7**) The terms of the offer were fully disclosed to Blunt before she entered into the contract (**ECF 19-5 and ECF 19-7** and **Exhibit 1, ¶¶5-8**). Of that, Blunt directly received a lump sum payment of $7,694.74. (**ECF 19, ¶8**) Additionally, a debt resolution company she retained (Innegrity Debt Solutions) received $3,159.00 to resolve Blunt's debts and Blunt may have also received some of those monies back from the company after they resolved her debts. **(See ECF 19, ¶8** and **Exhibit 1A).** As the transaction was life contingent and Blunt had not retained life insurance by the time of the closing, Blunt paid an additional $1,400.00 in lieu of life insurance. (**See ECF 19, ¶8**).

Blunt admits she forwarded **only Six (6) payments** totaling the paltry amount of **Two Thousand, Eight Hundred Thirty-Eight Dollars and Seventy-Eight Cent ($2,838.78)** Dollars in payments on the Contract (**ECF 19, ¶12)** she sought out and voluntarily entered for:



32. **Purpose of Sale**:

You must disclose the reason you wish to sell your payments on the lines below this paragraph. The Purchaser of your payments may rely on this representation when choosing to purchase your case. Any false and/or misleading information provided here may potentially result in the breach of your contract. Therefore, it is very important that you use the money you receive from this sale in accordance with your stated purpose.

I wish to sell my payments to consolidate credit cards to have one payment also, to be able to have savings in case of an emergency.

(**See ECF 19-5, p.12**)

Despite receiving exactly what she asked for and approving the breakdown of the distribution of the contracted amount she agreed to receive (**See Exhibit 1B)**, when sued for failing to even pay back the amount she *personally received* not even including the amounts paid on her behalf and at her direction for her debts (**See Exhibit 1A)**, Blunt then filed this a Third-Party Complaint seeking to avoid her obligations under these agreements claiming that the contract is unenforceable (against her), that the terms disclosed at inception were unfavorable (even unconscionable) and that everyone having anything to do with the transaction (except herself) is engaged in a "criminal enterprise" to "defraud" her. (**ECF 19).**

Notably, Kern-Fuller and Upstate were not involved in negotiating the terms and did not represent Plaintiff or advise her about the wisdom of entering into the transactions. (**See Exhibit 1, ¶4**). Rather, Upstate Defendants were engaged by the Buyer's intermediary, after the contracts were signed, to close the transactions and provide escrow services pursuant to those contracts for the benefit of the Buyer. (**See Exhibit 1, ¶¶3-4**). Blunt specifically states that she dealt with Defendant Corbett, and completed forms for SoBell Corporation to market her income stream and who made inquiries into Blunt's financial circumstances, benefits, and physical health. (**ECF 19, ¶104**).

Blunt is a military veteran who receives a monthly disability benefit from the federal government. (**ECF 19, ¶75)**. This disability income stream is administered by the Department of Veterans Affairs (VA). As recited above, Blunt sold a portion of her VA income streams to Mr. Battaglia for the described lump sum payment. Blunt entered into a Sales Assistance Agreement with Defendant SoBell Corp to facilitate the sale of her income stream. (**ECF 19-5)**. SoBell submitted a contingent offer on her behalf to Mr. Battaglia's intermediaries. After the offer was accepted, Blunt entered into a Contract for Sale of Payments with Battaglia. (**ECF 19-7)** Pursuant

to the Contract, Blunt directed the VA to deposit her entire monthly benefit into an escrow account maintained by Upstate Law Group, which then distributed the agreed-upon monthly payment to the Buyer and the balance to the Blunt. After receiving her lump sum of $13,200.00 and making only six payments totaling a mere $2,838.78. Prior to breaching her agreement with the Buyer altogether, Blunt directed the VA to stop depositing her monthly benefit into the Upstate escrow account and began sending her payment into the Escrow Account each month. (**Exhibit 1B).** She now contends that this transaction is an assignment that violates federal laws prohibiting certain veterans from "assigning" disability benefits.[1]

As discussed below, an assignment is an immediate, complete, and irrevocable transfer of the assignor's rights to the assignee. To constitute an assignment, the assignor must manifest an intent to relinquish control over the rights assigned and must actually transfer the rights to the assignee in such a way that the assignee then stands in the shoes of the assignor. In the context of the present dispute, an assignment would necessarily entail an irrevocable transfer of the assignor's rights to receive her disability benefits from the VA; Blunt would have to actually relinquish control over the benefits, and the Buyer, standing in Blunt's shoes, would be in a position to demand payment from the VA for her benefits. This was not the intent or effect of this transaction. Rather, Blunt promised to pay Buyer *from* her VA income stream, but retained complete control over the funds, which she undeniably exerted when she directed the VA to stop depositing her income stream into the Upstate escrow account.

Simply put, if this transaction was an assignment, Blunt would not have been able to unilaterally decide to no longer pay the Buyer from her VA income stream. Blunt's intent, the

[1] 38 U.S.C. § 5301 provides that "[p]ayments of benefits due or to become due under any law administered by the Secretary shall not be assignable except to the extent specifically authorized by law. . . ."

control she retained over her funds, and her actions in exercising that control could not be more inconsistent with an assignment of rights.

B. Contractual Provisions

The Sales Assistance Agreement that Blunt entered into with SoBell Corp provides, among other terms, the following:

WHEREAS, Seller desires to sell certain fixed payments arising from a certain structured asset that have been distributed and received by Seller (the "Payments") as described in this Sales Assistance Agreement;

* * *

7. **ACKNOWLEDGEMENT OF RISK SELLER AND SOBELL CORP EXPRESSLY ACKNOWLEDGE AND AGREE TO THE FOLLOWING**

   a. **SELLER AGREES THAT THE TRANSACTION(S) CONTEMPLATED BY THIS SALES ASSISTANCE AGREEMENT SHALL CONSTITUTE VALID SALE(S) OF PAYMENTS AND SHALL NOT CONSTITUTE IMPERMISSIBLE ASSIGNMENTS(S), TRANSFER(S), OR ALIENATION OF BENEFITS BY SELLER AS CONTEMPLATED BY APPLICABLE LAWS; HOWEVER, CERTAIN RISKS EXIST.**

(**ECF 19-5)** (emphases in original).

Prior to entering into the Contract for Sale of Payments, Blunt acknowledged in written, initialed and signed disclosures, among others that:

JB The lump sum purchase price you are accepting as indicated on the Sales Assistance Agreement may be significantly less than what you would receive over the length of your defined income stream. Further, as part of this transaction certain commissions and fees are being paid to parties connected with the transaction. You agree for these fees and commissions to be paid as part of this transaction. (*These commissions, fees and costs have already been calculated in the price you were quoted*)

* * *

You understand that **this is NOT a loan** and that SoBell Corp, is not a creditor. You understand and agree that this is a private transaction between you and the Buyer and that your obligations are to the Buyer and **NOT** SoBell Corp.

* * *

The Transaction Assistance Team strongly recommends that you seek independent professional advice to determine if this transaction is suitable and/or appropriate for you.

(ECF 10-3) (emphases in original).

Further, the Contract for Sale of Payments that Blunt entered into with the Buyer provides, among other terms, the following:

WHEREAS, Seller desires to sell certain fixed payments arising from a certain structured asset once they have been distributed to and received into an account of Seller (the "Payments") as described in this Contract for Sale; and,

* * *

4. Payment Servicing. The servicer of the Payments shall be the Upstate Law Group, LLC, located in Easley, South Carolina (the "Escrow Company") in accordance with the following:

4.1. Seller agrees to direct that the Payments be received and serviced by the Escrow Company in an account indicated in his/her name from which the Buyer shall be paid in connection with the closing of the sale of the Payments (the "Closing") and any additional amounts received over and above the Payments sent to Seller per his/her instructions; provided, however, that the Payment

Seller____ IRA Account Owner_____

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* * *

Source shall remain at all times the sole property of Seller and shall remain under the sole control of Seller.

* * *

8. Escrow. Beginning at Closing, Seller shall receive the Payments at the designated escrow account at Upstate Law Group, LLC which will be created per Seller's instructions, though the Payment Source and underlying asset shall remain the sole property of Seller and shall remain under the control of Seller.

* * *

10. ACKNOWLEDGMENT OF RISK. SELLER AND BUYER EXPRESSLY ACKNOWLEDGE AND AGREE TO THE FOLLOWING:

10.1. SELLER INTENDS TO ACTUALLY RECEIVE DISBURSEMENT OF EVERY PAYMENT DESCRIBED UNDER THIS CONTRACT FOR SALE, SELLER SHALL RETAIN AT ALL TIMES COMPLETE CONTROL OVER THE PAYMENTS AND THE

Seller LLB

IRA Account Owner_____

UNDERLYING ASSET DESCRIBED HEREIN, AND SELLER INTENDS TO SELL EVERY PAYMENT DESCRIBED HEREIN TO BUYER AFTER ACTUAL RECEIPT OF DISBURSEMENT PER THIS CONTRACT.

10.2. BOTH PARTIES INTEND THAT THE TRANSACTION(S) CONTEMPLATED BY THIS CONTRACT FOR SALE SHALL CONSTITUTE VALID SALE(S) OF PAYMENTS AND SHALL NOT CONSTITUTE IMPERMISSIBLE ASSIGNMENT(S), TRANSFER(S), OR ALIENATION OF BENEFITS BY SELLERS AS CONTEMPLATED BY APPLICABLE LAWS; HOWEVER, CERTAIN RISKS PERSIST.

10.3. BY EXECUTING THIS CONTRACT FOR SALE, BUYER AND SELLER ACKNOWLEDGE AND AGREE THAT BUYER AND SELLER ARE AWARE OF AND EXPRESSLY AND SOLELY ACCEPT ALL RISKS ASSOCIATED WITH THE TRANSACTION(S) CONTEMPLATED HEREIN, INCLUDING, BUT NOT LIMITED TO, THOSE APPEARING IN THE BUYER'S DISCLOSURE OF RISKS AND SELLER'S COST DISCLOSURES.

10.4. BUYER AND SELLER ACKNOWLEDGE AND AGREE THAT SOBELL CORP, THEIR DISTRIBUTORS, AGENTS, ATTORNEYS AND OTHER ENGAGED PROFESSIONALS AND ASSIGNS MAKE NO REPRESENTATIONS OR WARRANTIES WHATSOEVER CONCERNING WHETHER A COURT OF LAW WOULD INTERPRET THE TRANSACTION(S) CONTEMPLATED HEREIN AS INVALID ASSIGNMENT(S), TRANSFER(S) OR ALIENATION OF BENEFITS, OR OTHERWISE DEEM THE TRANSACTION INVALID.

* * *

14. HOLDING ACCOUNT. SELLER AGREES THAT DURING ANY PERIOD OF DISPUTE BETWEEN THE PARTIES TO THIS AGREEMENT OVER ANY TERMS IN THIS CONTRACT, THAT A HOLDING ACCOUNT SHALL BE ESTABLISHED BY THE ESCROW COMPANY WHEREBY THE ASSET IN DISPUTE SHALL BE DEPOSITED AND KEPT UNTIL SUCH TIME AS THE DISPUTE IS RESOLVED.

* * *

17. Governing Law. This Contract for Sale of Payments and all other parts of this transaction shall be construed according to the laws of the State of South Carolina, without regard to choice of law principles.

(**ECF 19-7**).

II. STANDARD OF REVIEW

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "By its very terms, this standard provides that the mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v.

Liberty Lobby, Inc., 477 U.S. 242, 247–48 (1986). Substantive law identifies which facts are material. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted." Id. at 248.

III. LAW AND APPLICATION

A. DJ Claim on the Federal Anti-Assignment Acts

The federal anti-assignment provision applicable to disability benefits administered by the VA provides in relevant part the following:

> *(a)(1) Payments of benefits due or to become due under any law administered by the Secretary shall not be assignable except to the extent specifically authorized by law . . .*
>
> * * *
>
> *3(A) This paragraph is intended to clarify that, in any case where a beneficiary entitled to compensation, pension, or dependency and indemnity compensation enters into an agreement with another person under which agreement such other person acquires for consideration the right to receive such benefit by payment of such compensation, pension, or dependency and indemnity compensation, as the case may be, except as provided in subparagraph (B), and including deposit into a joint account from which such other person may make withdrawals, or otherwise, such agreement shall be deemed to be an assignment and is prohibited.*

(B) Notwithstanding subparagraph (A), nothing in this paragraph is intended to prohibit a loan involving a beneficiary under the terms of which the beneficiary may use the benefit to repay such other person as long as each of the periodic payments made to repay such other person is separately and voluntarily executed by the beneficiary or is made by preauthorized electronic funds transfer pursuant to the Electronic Funds Transfers Act (15 U.S.C. 1693 et seq.).

38 U.S.C. § 5301.[2]

1. The subject transactions are not assignments in form or substance.

The Court should grant summary judgment on Count I of Plaintiffs' Amended Complaint because the transactions, as intended, agreed upon and carried out, are not assignments and therefore do not violate the Federal Anti-Assignment Acts.

"An assignment is the act of transferring to another all or part of one's property, interest, or rights." Moore v. Weinberg, 373 S.C. 209, 219, 644 S.E.2d 740, 745 (Ct. App. 2007) (citing Black's Law Dictionary 119 (6th ed.1992)), aff'd, 383 S.C. 583, 681 S.E.2d 875 (2009). By definition, an assignment necessarily entails "transfer of control of the thing assigned from the assignor to the assignee." Id. ("Three elements constitute an assignment: (1) an assignor; (2) an assignee; and (3) transfer of control of the thing assigned from the assignor to the assignee."); Lone Star Cement Corp. v. Swartwout, 93 F.2d 767, 769–70 (4th Cir. 1938) (An assignment is created where the assignor intends to relinquish control and vest a present right in the assignee).

Whether a contract is an assignment is a question of construction and is generally determined by the intention of the parties. St. Lawrence Cement, Inc. v. Spivey, 815 F.2d 965, 967

[2] 37 U.S.C. § 701 has similar provisions.

(4th Cir. 1987). To constitute an assignment, there must be an "immediate, complete, and irrevocable change of ownership with respect to the fund in question. . . so that the assignor loses all control over the fund in question and the [payor] can safely pay to the assignee." Player v. Player, 240 S.C. 274, 278, 125 S.E.2d 636, 638 (1962).

After an assignment, the assignee has all the same rights and privileges previously held by the assignor. Twelfth RMA Partners, L.P. v. Nat'l Safe Corp., 335 S.C. 635, 640, 518 S.E.2d 44, 46 (Ct. App. 1999). Stated another way, "[a]n assignee stands in the shoes of the assignor." BAC Home Loan Servicing, L.P. v. Kinder, 398 S.C. 619, 624, 731 S.E.2d 547, 549 (2012); e.g. Player, 240 S.C. at 278, 125 S.E.2d at 638 ("The true test of an equitable assignment is said to be whether the [payor] would be justified in paying . . . to the person claiming to be the assignee.") (quoting 4 Am. Jur. Assignments, 289, § 76); Bostrom, 60 N.D. 792, 236 N.W. at 734 ("When assigned, the assignee is entitled to receive the payments direct and to control the property the same as if originally owned by him.").

In the subject transaction, Blunt did not relinquish control of her VA benefits. Instead, she retained **sole and complete control** over her benefits and undeniably exercised that control when she directed the VA to stop depositing her payments into ULG's escrow account in February 2016. (**Exhibit 1, ¶10**) Nor did Blunt's transaction place Buyer into Blunt's shoes with respect to her VA benefits. Had Blunt assigned her VA benefits, the Buyer would have been in a position to demand payment directly from the VA, and the VA would be justified in paying their benefits directly to Buyer. See Player, 240 S.C. at 278, 125 S.E.2d at 638. Rather, the contract Blunt entered into with the Buyer does not provide any basis for Buyer to compel payment from the VA or any basis for the VA to make payment directly to the Buyer. It was not the intent or effect of this transaction to transfer ownership of Blunt's VA benefit to the Buyer. Instead, Blunt specifically

agreed to pay the Buyer *from* her VA benefits, which she did after February 2016, and which as a matter of law, does not amount to an assignment.

2. Blunt retained ultimate authority and control over her benefits.

One defining characteristic of an assignment is that the assignor relinquishes all control over the rights assigned. Moore, 373 S.C. at 219, 644 S.E.2d at 745 (an assignment necessarily entails "transfer of control of the thing assigned from the assignor to the assignee. . . ."). "[I]t must appear that an immediate, complete, and irrevocable change of ownership with respect to the fund in question was contemplated by the parties, so that the assignor loses all control over the fund in question. . . ." Player, 240 S.C. at 278, 125 S.E.2d at 638. It necessarily follows that "[o]nce a valid assignment has been made, the assignor cannot cancel or modify the assignment by unilateral action without the assent of the assignee; nor may he defeat the rights of the assignee." Moore, 373 S.C. at 222, 644 S.E.2d at 747.

Blunt's transaction lacks this defining characteristic. Indeed, as shown by her contract and by her actions, Blunt retained and exercised unilateral control over her VA benefits. Blunt's contract expressly provides that "Seller shall retain at all times complete control over the payments and the underlying asset described herein." It was only by retaining that control that Blunt was subsequently able to direct the VA to stop depositing her benefits into Upstate's escrow account in February 2016, but defaulting on the contract totally.

Other courts have found that transactions similar to these did not amount to assignments where the veteran retained control over the VA benefit through his ability to direct the VA to deposit the benefit into an account of his choosing. In In re Pierson, 447 B.R. 840 (Bankr. N.D. Ohio 2011), the Ohio bankruptcy court applied Section 701(c) to a similar transaction and found that it did not amount to an assignment. In that case, Mr. Pierson entered into a contract with

Structured Investments Company in which he agreed to pay a portion of his monthly military pension for a set period in exchange for a lump-sum distribution from Structured Investments. Id. To effectuate the transaction, and "consistent with their agreement, Mr. Pierson's military pension was electronically transferred to a deposit account maintained in Mr. Pierson's name; once the funds were on deposit, Structured Investments caused a debit of the account in the amount contractually due." Id. Mr. Pierson subsequently redirected his monthly pension into another account, thereby preventing Structured Investments from making further debits. Id.[3]

In the ensuing Chapter 13 bankruptcy, Mr. Pierson objected to the proof of claim filed by Structured Investments on the ground that the transaction was a prohibited assignment and void under Section 701(c). Id. at 846. In determining whether there was an actual assignment, the court applied California law pursuant to a choice of law provision in the contract with Structured Investments. Id. at 847. The court observed that under California law, an assignment is determined by "the intention of the parties, as manifested in the instrument[,] and that "[e]vidence of an equitable assignment must be clear and specific, and the assignor must not retain any control over the fund or any authority to collect." Id. at 847-48 (internal citations omitted). See e.g. Moore, 373 S.C. at 219, 644 S.E.2d at 745; Player, 240 S.C. at 278, 125 S.E.2d at 638.

The court found that because "Mr. Pierson retain[ed] ultimate authority and control over the disposition of his military pension[,]" no assignment occurred. Critically, the court found that the "ultimate authority and control" over the pension emanated from the ability to direct where the funds were deposited:

[3] In contrast to the transaction at issue here, in Pierson, the benefits were deposited into a joint account in which the buyer, Structured Investments, held co-signatory authority. Upstate Defendants are not aware of any court decisions in the Fourth Circuit or elsewhere applying the Acts to similarly-structured transactions in which the funds were deposited into an escrow account outside of the Buyer's control.

> . . . Mr. Pierson retained full control over his military pension up until the time it was transferred to Structured Investments. In particular, *Mr. Pierson was always free to direct the payor of his military pension to deposit the pension into an account over which Structured Investments had no interest and control*. If this had been a true assignment, however, Mr. Pierson would have divested himself of this authority.

In re Pierson, 447 B.R. at 848. (emphasis added).

Here, Blunt retained the same "ultimate authority and control" over her VA benefits. Blunt was at all times free to (and in February 2016 ultimately did) direct the VA to deposit her benefits into an account other than Upstate's escrow account. As in Pierson, Blunt's transaction lacks this defining characteristic of an assignment.

The fact that Blunt agreed to pay Buyer *from* her VA benefits does not amount to an assignment *of* her VA benefits. "There is a distinction 'between a promise to pay out of the fund after it comes to the hands of the promisor, and a direction to a present holder of the fund to pay it, or a part of it, to another person." Bostrom, 60 N.D. 792, 236 N.W. at 735. "[A] mere agreement to pay out of a particular fund does not constitute an assignment of the fund or any part thereof to the promisee, because it amounts only to a mere promise to pay, and does not meet the test of an intention on the part of the assignor to give and of the assignee to receive present ownership of the fund." Lone Star Cement, 93 F.2d at 770 (internal citations omitted). See also Bostrom, 60 N.D. 792, 236 N.W. at 735 ("A covenant to pay a debt out of certain funds does not operate as an assignment of that fund.").

3. Buyer does not stand Blunt's shoes with respect to her VA benefits.

The second defining characteristic of an assignment is that it effects a transfer of ownership of the rights and privileges assigned from assignor to assignee such that the assignee then "stands in the shoes of its assignor." BAC Home Loan Servicing, 398 S.C. at 624, 731 S.E.2d at 549; Twelfth RMA Partners, 335 S.C. at 639-40, 518 S.E.2d at 46 ("When a contract is assigned, the assignee should have all the same rights and privileges, including the right to sue on the contract, as the assignor.").

In the transaction at issue, Blunt did not transfer any such rights or privileges to the Buyer. Rather, the contract Blunt entered into with the Buyer does not provide any basis for the Buyer to compel payment from the VA. The Buyer did not acquire standing to sue the VA or any rights to direct or control the VA's disposition of Blunt's benefits. Nor does the contract provide any justification for the VA to make payment directly to the Buyer or otherwise deal with the Buyer rather than Blunt. See Player, 240 S.C. at 278, 125 S.E.2d at 638 ("The true test of an equitable assignment is said to be whether the [payor] would be justified in paying . . . to the person claiming to be the assignee."); see also Bostrom, 60 N.D. 792, 236 N.W. at 734 ("When assigned, the assignee is entitled to receive the payments direct and to control the property the same as if originally owned by him.").

4. The parties did not manifest an intent to assign Blunt's VA benefits.

Whether a contract is an assignment is a question of construction and is generally determined by the intention of the parties. St. Lawrence Cement, 815 F.2d at 967. "[T]he intent to vest in the assignee a present right in the thing assigned must be manifested by some oral or written word or by some conduct signifying a relinquishment of control by the assignor and an appropriation to the assignee." Lone Star Cement, 93 F.2d at 769-70. "The language of a contract provides the best means of discerning the intent of the parties. Therefore, if the terms of the

contract are clear and unambiguous, the intention expressed thereby controls its interpretation." St. Lawrence Cement, 815 F.2d at 967.

Here, Blunt agreed on multiple occasions and in no uncertain terms that the transaction was *not* intended to be an assignment of her VA benefits. She expressly agreed in the Sales Assistance Agreement with So Bell Corp and again in the Contract for Sale of Payments that "both parties intend that the transaction(s) contemplated by this contract for sale shall constitute valid sale(s) of payments and shall not constitute impermissible assignment(s). . . ." Consistent with that expressed intent, Blunt further agreed in Contract for Sale of Payments that she "intends to actually receive disbursement of every payment described under this contract for sale . . . shall retain at all times complete control over the payments and the underlying asset described herein, and . . . intends to sell every payment described herein to Buyer after actual receipt of disbursement per this Contract." (**ECF 19-7**)

The express language speaks for itself. Blunt initialed each page and signed the Contract to attest that she read, understood, and agreed to the terms therein. (**ECF 19-7**) See York v. Dodgeland of Columbia, Inc., 406 S.C. 67, 81, 749 S.E.2d 139, 146 (Ct. App. 2013) ("[A] party who signed a contract is deemed to have read and understood 'the effect' of the contract.").

Notwithstanding the position that Blunt now takes, "[a] contract must receive a reasonable construction consistent with the intention of the parties at the time they executed the contract. St. Lawrence Cement, 815 F.2d at 967. Moreover, "[i]nterpretation of a contract is governed by the objective manifestation of the parties' assent at the time the contract was made, rather than the subjective, after-the-fact meaning one party assigns to it." In re Genesis Press, Inc., 559 B.R. 445, 454 (Bankr. D.S.C. 2016) (quoting N. Am. Rescue Prod., Inc. v. Richardson, 411 S.C. 371, 378, 769 S.E.2d 237, 241 (2015)).

The form and substance of this transaction shows that the parties did not intend an assignment of Blunt's VA benefits.

5. Blunt's freedom to sell payments does not frustrate the purpose of the anti-assignment statutes.

Courts that have addressed these and other federal anti-assignment statutes have generally recognized that anti-assignment restrictions are only intended to apply to dealings between the government and the benefit recipient; once the funds are received, the recipient may do with them what he chooses. Bostrom, 60 N.D. 792, 236 N.W. at 735 (recognizing that under prior veteran benefit statute, "the beneficiary may make his own contracts as to what he will do with the money after he gets it."); Structured Investments Co. v. Richard A. Weber (In re Weber), Not Reported in B.R., 2009 WL 983311, at *3 (Bankr. D. Neb. 2009) (The anti-assignment restriction "ends when the funds have been distributed to the recipient . . . What the recipient chooses to do with the funds thereafter is not governed by Section 701."); see also Hobbs v. McLean, 117 U.S. 567, 576, 6 S. Ct. 870, 874, 29 L. Ed. 940 (1886) (the purpose of statute prohibiting the assignment of federal contracts "was not to dictate to the contractor what he should do with the money received on his contract after the contract had been performed.").

Indeed, the purpose of anti-assignment restrictions generally is to avoid government entanglement in disputes with creditors and other third parties. Martin v. Nat'l Sur. Co., 300 U.S. 588, 594, 57 S. Ct. 531, 534, 81 L. Ed. 822 (1937) (the anti-assignment provisions in 31 U.S.C. § 20 "are for the protection of the Government. In the absence of such a rule, the Government would be in danger of becoming embroiled in conflicting claims, with delay and embarrassment and the chance of multiple liability."); Hobbs, 117 U.S. at 576 (statutes prohibiting the assignment of federal contracts and claims against the government "were passed in order that the government might not be harassed by multiplying the number of persons with whom it had to deal, and might

always know with whom it was dealing until the contract was completed and a settlement made."); Bostrom, 60 N.D. 792, 236 N.W. at 735 (observing that under prior veteran benefit statute, "[t]he proceeds cannot be assigned so as to compel the United States to pay to the assignee, nor give the assignee any claim whatever against the United States so as to hamper the latter or in any way compel it or even permit it to recognize the assignee. But the beneficiary may make his own contracts as to what he will do with the money after he gets it.").

In Pierson, 447 B.R. at 848, the court found that "allowing [the veteran] to enter into a contractual relationship involving the use of his pension funds, once the funds had been distributed, does not frustrate the purpose of § 701(c)." The court recognized that to find an assignment under those circumstances would "extend the reach of § 701(c) so as to protect the recipients of military pensions from the choices they make after the funds have been distributed to and then spent by the pensioner." Id. **Thus, "far from helping military pensioners, such a reading of § 701(c) would frustrate the ability of military pensioners from engaging in commerce as parties providing goods and/or services would be justifiably hesitant to enter into a contractual relationship with any person receiving a military pension."** Id. (Emphasis added)

The Pierson court found support in a Nebraska bankruptcy decision that applied Section 701(c) to a similar transaction and reached the same conclusion:

> By its language, 37 U.S.C. § 701(c) prohibits recipients of military pay such as Mr. Weber from assigning what they are due from the government to anyone else. Logically, that prohibition ends when the funds have been distributed to the recipient, in this case, Mr. Weber. What the recipient chooses to do with the funds thereafter is not governed by Section 701. In other words, the anti-assignment statute applies to the transaction between the government and the debtor. When the monthly payment has been deposited in Mr. Weber's bank account, the transaction is concluded and the government has no further control over Mr. Weber's disposition of those funds. For that reason, 37 U.S.C. § 701(c) does not invalidate the contract….

Structured Investments Co. v. Richard A. Weber (In re Weber), No. A08-8012-TJM, 2009 WL 983311, at *3 (Bankr. D. Neb. Apr. 10, 2009). See id. (distinguishing Structured Inv. Co. v. Webb (In re Webb), 376 B.R. 765 (Bankr. W.D. Okla. 2007) and Structured Inv. Co. v. Price (In re Price), 313 B.R. 805 (Bankr. E.D. Ark. 2004)).

As the courts in Pierson and Weber found, the anti-assignment provisions of the Acts were not intended to remove military benefits from the application of general contract law where a veteran has willingly entered into an agreement after receipt of distributed payments. Once veterans receive their fixed income, they should be free to use their benefits as they see fit and in a manner that best supports their financial needs.

In sum, the transaction that Blunt voluntarily sought out and entered into lack the hallmarks of a true assignment. Blunt did not relinquish control of her VA benefits, she did not transfer ownership of her VA benefits, and the Buyer does not stand in her shoes with respect to the VA benefits. Instead, Blunt agreed to (and did after February 2016) pay buyer from her VA benefits, which as a matter of law does not amount to an assignment of those benefits.

For those reasons, this Court should find that these transactions were not assignments and grant Upstate Defendants summary judgment as to Count I of the TP Complaint.

B. Taken in a Light Most Favorable to Blunt She Cannot Make a Civil RICO Claim Against Kern-Fuller.

In order to prevail in a civil RICO action, a plaintiff must show that the defendant has violated the substantive RICO statute, 18 U.S.C. § 1962 (1988). The elements common to all civil RICO claims are as follows:

> (1) that a "person" (2) through a "pattern of racketeering activity" (3) directly or indirectly invests in, or maintains an interest in, or participates in (4) an "enterprise," (5) the activities of which affect interstate or foreign commerce, and (6) that he was injured by reason of this activity.

Parkell v. South Carolina, 687 F. Supp.2d 576, 590 (D.S.C. 2009) (*quoting* 18 U.S.C. §§ 1962(a)-(c), 1964(c)).

Blunt must prove specific facts that Kern-Fuller violated RICO. As detailed in Kern-Fuller's Motion to Dismiss, Blunt's RICO claim against Kern-Fuller (individually – i.e. her 18th Defense by way of Third Party Claim against Gamber, Corbett, Snyder, Plant and Kern-Fuller, TP ¶¶164-177) is fatally flawed for a number of reasons.

Specifically, Blunt has no evidence that Kern-Fuller committed *any* predicate acts of mail fraud or wire fraud or engaged in conduct that would amount to a "classic fraud" necessary to support these predicate acts. Further, Blunt has no evidence that any conduct attributable to Kern-Fuller rises to the level of operating or managing a criminal enterprise or a pattern of racketeering. Further, Blunt has no evidence that she sustained *any* injuries as a proximate result of any alleged predicate acts attributable to Kern-Fuller.

Blunt's sole allegation of evidence that Kern-Fuller is "on the team" is her allegation that Kern-Fuller is part of the "Transaction Assistance Team." Specifically, Blunt refers to the paragraph of the SoBell Corp documents (which Kern-Fuller does not control) that states:

> The SoBell "New Seller Information Packet" states that: *The Transaction Assistance Team (i.e., SoBell Corp., their attorneys. Vendors, and/or agents)* will withhold an amount equal to one monthly from the lump sum purchase price to ensure that that your annuity provider successfully and timely changes your payment information and keep you out of default of your sales agreement.

(**ECF 19, ¶166**)

However, Kern-Fuller is not and has never has been an attorney, vendor and/or agent of SoBell Corp. (**Exhibit 1, ¶5**) As such, Blunt cannot prove Kern-Fuller is part of the "Transaction Assistance Team." As such, Blunt is precluded from bringing a civil RICO claim against Kern-Fuller.

1. **Blunt has no evidence that Kern-Fuller committed any predicate acts under RICO.**

Blunt's RICO claims against Defendants Kern-Fuller, Corbett and Gamber are purportedly premised on predicate acts of alleged mail fraud and wire fraud under 18 U.S.C. §1341 and § 1342, respectively. (TP Compl. ¶¶ 1.) However, to support a claim for violation of the mail or wire fraud statutes, Blunt must produce facts that show Kern-Fuller: (1) devised or intended to devise a scheme to defraud and (2) used the mail or wire communications in furtherance of the scheme. See United States v. Jefferson, 674 F.3d 332, 366 (4th Cir. 2012).

Further, she must prove a RICO claim based on a mail or wire fraud scheme by proving the time, place, content of, and parties to the fraudulent communications, and then must also show that she was deceived by those communications. Chisolm, 95 F.3d at 336-37. Moreover, "where fraud is alleged as a proximate cause of the injury, the fraud must be a 'classic' one. In other words, the plaintiff must have justifiably relied, to his detriment, on the defendant's material misrepresentation." Id. at 337.

However, there was no material misrepresentation made by Kern-Fuller to Blunt. As stated *supra* neither Kern-Fuller nor any staff member of ULG were involved in negotiating the terms of the Sales Assistance Agreement or Contract for Sale of Payments entered into by Blunt. (**ECF 19-5** and **ECF 19-7**). ULG first received the documents for this transaction on September 22, 2015. (**Exhibit 1, ¶3)**. The Sales Assistance Agreement was executed by Blunt on July 9, 2015. (**ECF 19-5).** The Contract for Sale of Payments was executed by Blunt on July 28, 2015 and the Buyer on August 6, 2015. (**ECF 19-7**).

Kern-Fuller did not represent Blunt or advise her about the wisdom of entering into the transactions. Rather, Kern-Fuller's firm was engaged by the Buyer's intermediary, after the contracts were signed, to close the transaction and provide escrow services pursuant to this Contract for the benefit of the Buyer. (**Exhibit 1, ¶4)**. At no time has Kern-Fuller ever represented,

been an agent or vendor of Andrew Gamber, Mark Corbett, SoBell Corp, BAIC, Inc., or VFG (f/k/a Voyager Financial Group). Rather, Kern-Fuller has always represented the Buyer's side of the transaction and those entities represent the Seller's side of the transaction. (**Exhibit 1, ¶5)**.

When alleging that multiple defendants were engaged in a scheme to defraud, a plaintiff must plead and prove facts showing that *each defendant* committed the predicate acts necessary to support a RICO claim. See USA Certified Merchs., LLC v. Koebel, 262 F. Supp. 2d 319, 332 (S.D.N.Y. 2003) ("[W]here more than one defendant is charged with fraud, it is necessary for a plaintiff to particularize and prove each defendant's participation in the fraud and each defendant's enactment of the two necessary predicate acts."); Lakonia Mgmt. v. Meriweather, 106 F. Supp. 2d 540, 550 (S.D.N.Y. 2000) (under RICO, a "plaintiff must establish that each defendant committed at least two acts of racketeering—or two 'predicate acts'—within a ten-year period").

Blunt can identify no instances in which Kern-Fuller "caused to be transmitted in interstate commerce materially incomplete disclosure documents and induced veterans to enter into agreements that are void and unenforceable under federal law" or that "in fact, interstate wire and mail communications were used in furtherance of their fraudulent activities" as alleged in her Third-Party Complaint. (**ECF 19, ¶¶ 171-172**). Blunt can product no instances of Kern-Fuller actually using the mail, much less any mailing by Kern-Fuller in furtherance of a "classic fraud" as required to support a civil RICO claim based on mail fraud. Chisolm, 95 F.3d at 336-37.

Likewise, Blunt can not identify *any* wire transfers specific to her transaction, only generalized allegations describing wire transfers that occurred *subsequent* to Blunt entering into her contract with SBC wherein she had already agreed to what lump sum amount she would receive. In sum, Blunt can not identify a single intentional misrepresentation of material fact made by Kern-Fuller that deceived Blunt and one upon which she justifiably relied upon to her detriment.

Further, by the very facts and documents attached to Blunt's Third-Party Complaint, there could be no predicate acts that Kern-Fuller committed that would have *induced* Blunt to enter into her contract because the contract was admittedly already entered into and executed by Blunt at the time Kern-Fuller became involved in the transaction (**See ECF 19-5, 19-7** and **Exhibit 1).** Likewise, Blunt cannot prove that Kern-Fuller committed any predicate act of wire fraud let alone that Kern-Fuller committed any additional predicate acts to rise to the level of racketeering. In American Chiropractic Ass'n v. Trigon Healthcare, Inc., 367 F.3d 212 (4th Cir. 2004),

2. Blunt has no evidence that Kern-Fuller operated or managed a criminal enterprise.

For a defendant to be liable under RICO § 1962(c), the defendant must not merely have participated in the enterprise's affairs but must have participated in the operation or management of the enterprise itself. Reves v. Ernst & Young, 507 U.S. 170, 185 (1993); see also Baumer v. Pachl, 8 F.3d 1341 (9th Cir. 1993); Azrielli v. Cohen Law Offices, 21 F.3d 512 (2d Cir. 1994); Hayden v. Paul, Weiss, Rifkind, Wharton & Garrison, 955 F. Supp. 248, 254 (S.D.N.Y. 1997) ("the provision of professional services by outsiders, such as accountants, to a racketeering enterprise, is insufficient to satisfy the participation requirement of RICO, since participation requires some part in directing the affairs of the enterprise itself").

In Reves, the Court held that an accounting firm was not subject to RICO liability for allegedly failing to disclose a defendant's financial condition to the plaintiffs because the firm did not participate in the management or operation of the RICO enterprise. Reves, 507 U.S. at 185. Following Reves, the court in Baumer, 8 F.3d at 1344, held that an attorney who wrote letters, prepared a partnership agreement, and assisted in a bankruptcy proceeding, failed the "operation or management" test set out by the Supreme Court. Id. (Attorney's "role was limited to providing

legal services to the [alleged enterprise]. Whether [attorney] rendered his services well or poorly, properly or improperly, is irrelevant to the Reves test."). Similarly, in Azrielli, 21 F.3d at 513, an attorney was not liable under RICO where he was alleged to have represented the defendants in the transactions at issue, but he did not participate in the management or direction of the enterprise. See also Biofeedtrac, Inc. v. Kolinor Optical Enter. & Consultants, S.R.L., 832 F. Supp. 585, 591 (E.D.N.Y. 1993) (dismissing RICO claim against attorney whose "role was confined, at all times, to providing legal advice and legal services" and noting that "even when professionals go beyond their customary role, they will not be deemed to have participated in 'the operation or management of the enterprise itself.'"); Morin v. Trupin, 835 F. Supp. 126, 135-36 (S.D.N.Y. 1993) (dismissing RICO claim against attorneys on grounds that their alleged actions only "capacitat[ed] the operation of the enterprise," but did not amount to its operation or management).

In the present case, Kern-Fuller's position is similar to that of the accountants in Reves and the attorneys in Baumer and Azrielli. Kern-Fuller and Upstate are alleged to have maintained an IOLTA account "as the conduit through which the Purchasers' deposits and the veterans' deposits flow." (**ECF 19, ¶124**). In sharp contrast, others are the ones Blunt has alleged "managed" the alleged criminal enterprise. ("Gamber directs the operation of at least BAIC, Voyager, and SoBell. Indeed, on information and belief, Mr. Gamber is the mastermind behind the activities outlined above.") (**ECF 19, ¶112**). Blunt did not allege, nor an she prove that Kern-Fuller individually operates or manages *any* RICO enterprise.

Blunt only alleged, but cannot prove, that Gamber "consulted" with other RICO Defendants (purported one of whom is Kern-Fuller). However, taken in a light most favorable to Blunt, even if she could prove "consultation," a consulting role is, at most, akin to aiding and abetting, which is not sufficient to support a RICO claim. Central Bank of Denver, N.A. v. First Interstate Bank of

Denver, N.A., 511 U.S. 164, 181 (1994) (determining that in a civil action brought by a private plaintiff, a defendant's liability for violating RICO may not be based merely upon aiding and abetting the RICO violations of others.) Furthermore, "consulting" falls well short of actual operation or management of the alleged enterprise, as required under Reves, 507 U.S. 170.

Furthermore, there is not necessarily "an illicit accord because it [i]s not only compatible with, but indeed [i]s more likely explained by, lawful, unchoreographed free-market behavior," Id. at 1950; see also Am. Dental Ass'n v. Cigna Corp., 605 F.3d 1283, 1295 (11th Cir. 2010). Taken in a light most favorable to Blunt, Kern-Fuller's participation in and provision of normal escrow and legal services falls far short of proving that Kern-Fuller knowingly agreed to further the purpose of unlawfully inducing veterans to assign their benefits. Rather, even in a light most favorable to Blunt, the only plausible inference to be taken from Kern-Fuller's provision of professional services is that she was merely doing her job to provide escrow services according to the terms agreed upon in the contract entered into by Blunt and her Buyer prior to the involvement of the Upstate Defendants in Blunt's transaction.

3. Blunt has no evidence of any injuries caused by Kern-Fuller's predicate acts.

RICO "provides a private right of action . . . to '[a]ny person injured in his business of property *by reason of* a violation' of the Act's criminal prohibitions." Bridge v. Phoenix Bond & Indem. Co., 553 U.S. 639, 641 (2008) (quoting 18 U.S.C. § 1964(c)) (emphasis added). To have standing to assert a private cause of action for RICO violations, a plaintiff must allege (1) violations of § 1962; and (2) injuries to their business or property that were proximately caused by these RICO violations. Sadighi v. Daghighfekr, 36 F. Supp. 2d 279, 292 (D.S.C. 1999).

To meet the burden of proximate cause where fraud is alleged as predicate act, a plaintiff must show that he "justifiably relied, to his detriment, on the defendant's material

misrepresentation." Am. Chiropractic Ass'n, 367 F.3d at 233 (quoting Chisolm, 95 F.3d at 337); see also Sadighi, 36 F. Supp. 2d at 292 (explaining for RICO claim that "Plaintiffs must have justifiably relied to their detriment on [defendant's] misrepresentations").

As shown by Blunt's own attachments to her Third-Party Complaint (**ECF 19)** and Mr. Sutter's Affidavit regarding the Upstate Defendants' involvement in this transaction (**Exhibit 1)** there could be no plausible allegations that Blunt relied on any statement or other representation by Kern-Fuller or Upstate to her detriment because the contracts she entered were executed prior to any involvement by Kern-Fuller or Upstate. See e.g., Toney v. LaSalle Bank Nat. Ass'n, 896 F. Supp. 2d 455, 480 (D.S.C. 2012). Blunt cannot identify any alleged misrepresentation that Kern-Fuller made to Blunt that caused her to enter these contracts, much less any facts to support an allegation that Blunt relied to her detriment on any representation at all by Kern-Fuller.

Blunt also cannot point to a single "injury" was caused by Kern-Fuller's or Upstate Law's purported violation of federal criminal mail and fraud statutes (which she has also failed to particularize). In fact, as pointed out above, the only conduct by Kern-Fuller that Blunt labels "wire fraud" clearly occurred after Blunt had already entered into the contracts. (**ECF 19, ¶¶107-108**). Blunt can identify no "mailings" by Kern-Fuller that arise to the level of mail fraud. In sum, Blunt can not prove the scant (and insufficient) allegations she has made.

4. Blunt cannot prove a pattern of racketeering.

To establish a pattern of racketeering activity, a plaintiff must not only allege predicate acts as to each RICO defendant, but also show "that the predicates themselves amount to, or that they otherwise constitute a threat of, continuing racketeering activity." H.J. Inc. v. Nw. Bell Tel. Co.

492 U.S. 229, 240 (1989). As the Fourth Circuit has recognized, "[t]hese requirements are designed to prevent RICO's harsh sanctions, such as treble damages, from being applied to gardenvariety fraud schemes." ePlus Technology, Inc. v. Aboud, 313 F.3d 166, 181 (4th Cir. 2002).

As it relates to Kern-Fuller and Upstate Law, cannot prove as vaguely alleged that "each and every one of the RICO Defendants conducted the affairs of the enterprise through a pattern of racketeering activity in violation of 18 U.S.C. § 1962(c), (d)." (**ECF 19, ¶¶165-177**). As such, Blunt cannot prove any specific facts related to any activity of Kern-Fuller or Upstate Law that would show a pattern of racketeering.

5. Blunt cannot prove that Kern-Fuller or Upstate Law was engaged in an "enterprise."

The existence of a RICO enterprise is "proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." United States v. Turkette, 452 U.S. 576, 583 (1981). In general, "[a]n enterprise must 'exhibit three basic characteristics: (1) a common shared purpose; (2) some continuity of structure and personnel; and (3) an ascertainable structure distinct from that in a pattern of racketeering'." United States v. Baires, 254 F. App'x 196, 199 (4th Cir. 2007) (quoting United States v. Nabors, 45 F.3d 238, 240 (8th Cir. 1995)).

In order to prove a violation of 18 U.S.C. § 1962(c), a plaintiff must show that the ability of the alleged enterprise to exist separate and apart from the pattern of racketeering activity it is alleged to engage in. United States v. Tillett, 763 F.2d 628, 632 (4th Cir. 1985) (citing United States v. Turkette, 452 U.S. 576, 583 (1981)). Furthermore, the enterprise must be distinct from the defendants alleged to have violated Section 1962(c). Delk v. ArvinMeritor, Inc., 179 F. Supp. 2d 615, 627 (W.D.N.C. 2002) (citing New Beckley Mining Corp. v. Int'l Union, United Mine

Workers of America, 18 F.3d 1161, 1163 (4th Cir. 1994). In Delk, the court found that a plaintiff's claim for a federal civil RICO violation failed because she did not allege, nor did she offer any facts to support, the existence of an enterprise separate and distinct from the RICO defendants. Merely arguing that the concerted activity of defendants establishes a continuing enterprise between such defendants is insufficient. See Delk, 179 F. Supp. 2d at 627. Blunt's unsupported allegation that RICO Defendants "operate *in conjunction*" is analogous to the allegations in Delk that defendants "*concerted activity*" establishes a continuing enterprise, which the Delk court found insufficient. Blunt cannot establish facts sufficient to show that Kern-Fuller was engaged in a RICO enterprise.

6. Claims based on conduct that would amount to securities fraud cannot be brought in an action for civil RICO.

Blunt argues that the number of orders issued by state securities commissions against other Defendants somehow prove a RICO conspiracy. However, neither Upstate nor Kern-Fuller were the subject of *any* of those orders. However, to the extent that Blunt relies on the orders to claim some illegality of the transactions at issue, those claims would potentially amount to securities fraud. If the alleged conduct is actionable as fraud in the sale of securities, it cannot be grounds for a civil RICO claim under Section 1962. The Private Securities Litigation Reform Act of 1995 ("PSLRA") amended RICO to eliminate securities fraud as a predicate act except where a defendant has been convicted of securities fraud. See 18 U.S.C § 1964(c) ("no person may rely upon any conduct that would have been actionable as fraud in the purchase or sale of securities to establish a violation of Section 1962.").

The PSLRA bars RICO claims based on securities fraud. Capital Investment Funding, LLC v. Field, Civil Action Nos. 6:12-3401-BHH, 6:13-2326-BHH, 2015 WL 247720 (D.S.C. Jan. 20,

2015) (holding that the PSLRA precludes plaintiff's RICO claim based on mail, bank, and wire fraud as part of an overall securities fraud scheme); see also MLSMK Inv. Co. v. JP Morgan Chase & Co., 651 F.3d 268, 280 (2d Cir. 2011) (holding that PSLRA precluded RICO claim based on securities fraud even if the plaintiff does not have standing to bring an action under the securities law); Bixler v. Foster, 596 F.3d 751 (10th Cir. 2010) (affirming dismissal of RICO claim based on predicate acts such as mail and wire fraud where the conduct was in connection with the purchase of a security); Metz v. United Counties Bancorp, 61 F. Supp. 2d 364, 37-71 (D.N.J. 1999) (mail and wire fraud may not be used as predicate acts under RICO when the alleged fraud is based on conduct that would have been actionable as securities fraud).

To the extent that Blunt attempt to set forth a RICO claim based on alleged securities fraud, the same is barred by the PSLRA.

C. Civil Conspiracy

A civil conspiracy exists where there is (1) a combination of two or more persons; (2) for the purposes of injuring the plaintiff; (3) which causes special damages. Pye v. Estate of Fox, 369 S.C. 555, 567, 633 S.E.2d 505, 511 (2006). "The 'essential consideration' in civil conspiracy 'is not whether lawful or unlawful acts or means are employed to further the conspiracy, but whether the primary purpose or object of the combination is to injure the plaintiff.'" Id. (quoting Lee v. Chesterfield General Hosp Inc., 289 S.C. 6, 13, 344 S.E.2d 379, 383 (Ct. App. 1986).

Blunt's civil conspiracy claim against Upstate and Kern-Fuller fails for a number of reasons. Specifically: (a) Upstate and Kern-Fuller are immune from liability; (b) Blunt has not pled and cannot prove separate acts undertaken by Upstate and Kern-Fuller; (c) Blunt has not pled and cannot prove special damages.

1. Third-Party Immunity

In South Carolina, "[i]t is well established that an 'attorney is immune from liability to a third person arising from the performance of his professional activities as an attorney'." Argoe v. Three Rivers Behavioral Ctr. & Psychiatric Sols., 388 S.C. 394, 400, 697 S.E.2d 551, 554 (2010) (quoting Pye v. Estate of Fox, 369 S.C. 555, 564, 633 S.E.2d 505, 509 (2006)). "[A]n attorney may be held liable for conspiracy where, in addition to representing his client, he breaches some independent duty to a third person or acts in his own personal interest, outside the scope of his representation of the client." Stiles v. Onorato, 318 S.C. 297, 300, 457 S.E.2d 601, 602 (1995). Neither Upstate nor Kern-Fuller represented her in the transaction at issue. (**Exhibit 1**) Further, Blunt's own intermediaries advised her (and she acknowledged the same) that she should consult her own, independent counsel. **(ECF 10-3**) There was no independent duty owed to Blunt, nor did she allege the same. (**ECF 19**). As such, Upstate and Kern-Fuller are immune from liability to Blunt arising from their legal services in this transaction.

2. Blunt cannot prove additional acts in furtherance of the alleged civil conspiracy

"In a civil conspiracy claim, one must plead additional acts in furtherance of the conspiracy separate and independent from other wrongful acts alleged in the complaint, and the failure to properly plead such acts will merit the dismissal of the claim." Hackworth v. Greywood at Hammett, LLC, 385 S.C. 110, 115, 682 S.E.2d 871, 874 (Ct. App. 200). The acts alleged in the Conspiracy claim as the realleged, identical acts previously referenced in the TP Complaint. As such, Blunt's claim for civil conspiracy must fail.

3. Plaintiffs failed to plead and cannot prove special damages.

Special damages are those elements of damages that are the natural, but not the necessary or usual, consequence of a defendant's conduct. Loeb v. Mann, 39 S.C. 465, 469, 18 S.E. 1, 2

(1893). General damages are inferred by law, whereas special damages are not implied because they do not necessarily result from the wrong. Sheek v. Lee, 289 S.C. 327, 329, 345 S.E.2d 496, 497 (1986). Special damages must, therefore, be specifically alleged in the complaint to avoid surprise to the other party. Id. If a plaintiff merely repeats the damages from another claim instead of specifically listing special damages as part of their civil conspiracy claim, their conspiracy claim should be dismissed. Vaught v. Waites, 300 S.C. 201, 209, 387 S.E.2d 91, 95 (Ct. App. 1989).

In this case, Blunt makes mere cursory allegations of special damages that are duplicative of financial damages alleged elsewhere in her Complaint, as well as alleged emotional and mental damages that are not plausibly caused by any alleged conspiracy. Blunt alleges in her Civil Conspiracy claim that "[t]he activities of the Defendants in furtherance of the civil conspiracy have injured Veteran Blunt by subjecting her to unconscionable fees, charging for unnecessary and illegal quasi-life insurance, and by collecting and distributing sums from her in a fashion prohibited by Federal law. In addition, the acts of the defendants in furtherance of the conspiracy caused her to suffer special damages, including but not limited to financial distress (including the economic losses incurred – directly and indirectly – by virtue of having to pay extortionately high, but undisclosed, rates of imputed interest), emotional distress and mental anguish. (**ECF 19, ¶ 182**) These are not special damages, but, rather the same unsupported damages alleged. Blunt could not plausibly have suffered *any* financial distress as a result of the lump sum she received which far *exceeds* the amount she has paid back.

4. Blunt cannot prove Upstate Defendants intended to harm her.

"The 'essential consideration' in civil conspiracy 'is not whether lawful or unlawful acts or means are employed to further the conspiracy, but whether the primary purpose or object of the combination is to injure the plaintiff.'" Pye v. Estate of Fox, 369 S.C. 555, 567, 633 S.E.2d 505,

511 (2006) (quoting Lee v. Chesterfield General Hosp., Inc., 289 S.C. 6, 13, 344 S.E.2d 379, 383 (Ct. App. 1986).

Blunt has not pled, nor can she prove, that Upstate Defendants had an ulterior purpose or intent to specifically harm Blunt. Blunt cannot prove that Defendants Upstate's actions were outside the scope of legal services rendered as an escrow agent or attorney. The calculus as explained in Pye necessarily includes an element of intent to injure the plaintiff, which is clearly lacking in this case. There is absolutely no evidence that to support an agreement between Upstate or Kern-Fuller with any other Defendant(s) to intend to injure Blunt. As such, Blunt's claim for civil conspiracy fails.

IV. CONCLUSION

As set forth below, Upstate Defendants are entitled to Summary Judgment on all of Blunt's Third-Party Claims because the undisputed facts are that:

1) Blunt's claim for declaratory relief raises a narrow question of law, and the facts relative to the form and structure of Blunt's transaction are not in dispute. As shown above, because the agreements in question do not amount to assignments, Defendants Upstate are entitled to judgment as a matter of law as to Blunt's claim for declaratory relief;
2) Blunt's claim under RICO fails to prove: a) that Kern-Fuller engaged in any predicate acts of mail fraud or wire fraud; b) that Kern-Fuller participated in, much less operated or managed a criminal enterprise; c) that Kern-Fuller engaged in a pattern of racketeering; or d) that Blunt sustained any injuries as a proximate result of any racketeering activity by Kern-Fuller
3) Blunt cannot prove that Upstate Defendants engaged in Civil Conspiracy because: 1) Upstate Defendants are immune; 2) Blunt cannot prove additional acts in furtherance of

the alleged civil conspiracy by Defendants Upstate; 3) Blunt has not pled and cannot prove special damages relating to said civil conspiracy by Defendants Upstate; and/or 4) Blunt cannot prove that Defendants Upstate conspired to specifically injure Blunt.

For these reasons, Defendants Upstate are entitled to Summary Judgment as a matter of law on all of Blunt's claims.

WE SO PRAY.

s/ Candy M. Kern-Fuller, Esq.
Candy M. Kern-Fuller, Esq.
S.C. Bar #11392; Federal Bar # 9149
UPSTATE LAW GROUP, LLC
200 East Main Street
Easley, South Carolina 29640
(864) 855-3114
(864) 855-3446 (Facsimile)

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ATTORNEY FOR UPSTATE LAW GROUP, LLC AND CANDY M. KERN-FULLER, ESQ.